United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7505

To be argued by
Roy E. Pomerantz.

United States Court of Appeals

For the Second Circuit.

CROWN FINANCIAL CORPORATION,
Plaintiff-Appellee,

against

WINTHROP LAWRENCE CORPORATION and
LAMMOT DuPONT COPELAND, JR.,
Defendants,

and

DIVERSIFIED GENERAL, INC.,
Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

MAIN BRIEF OF INTERVENOR-APPELLANT, DIVERSIFIED GENERAL, INC.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1975

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and DIVERSIFIED GENERAL, INC.

Intervenor-Appellant

MAIN BRIEF OF INTERVENOR-APPELLANT DIVERSIFIED GENERAL, INC.

ISSUES

1. Was it error for the District Court to refuse to permit DIVERSIFIED to intervene in the action?

2. Was it error for the District Court to refuse to vacate the default judgment entered against WINTHROP LAWRENCE?

3. Was it error for the District Court to take the position that the matter should be referred to the Trustee in Bankruptcy?

STATEMENT OF CASE

This is an Appeal from the denial of a motion made by Intervenor-Appellant, DIVERSIFIED GENERAL, INC. (hereinafter, "DIVERSIFIED") pursuant to Federal Rules of Civil Procedure, Rule 24 (a)(2), for leave to intervene and pursuant to Federal Rules of Civil Procedure, Rule 60 (b)(4) to vacate a default judgment entered against WINTHROP LAWRENCE CORPORATION, (hereinafter, "WINTHROP LAWRENCE"), on the ground that the judgment was void.

STATEMENT OF FACTS

In June, 1974 DIVERSIFIED purchased 100 acres of real property located in Madera County, California from the Receiver in Bankruptcy of WINTHROP LAWRENCE (Appendix, Page 28a). DIVERSIFIED has learned that a default judgment entered November 25, 1970 in the United States District Court for the Southern District of New York against WINTHROP LAWRENCE, in the amount of $297,116.54 (Appendix, Page 27a) in favor of Plaintiff-Appellee, CROWN FINANCIAL CORPORATION, (hereinafter "CROWN") was registered with the Madera County Clerk on December 28, 1970 (Appendix, Page 26a), and constitutes a cloud upon DIVERSIFIED'S title to such real property.

The events leading up to the entry of the judgment of November 25, 1970 are as follows:

By order of the United States District Court for the Southern District of New York dated October 28, 1970 (Appendix, Page 27a), summary judgment was granted in favor

of CROWN upon WINTHROP LAWRENCE'S default in an action maintained by CROWN to recover on a promissory note executed by WINTHROP LAWRENCE to CROWN dated September 12, 1969 in the amount of $400,000 (Appendix, Page27a). The order of October 28, 1970 directed that a hearing and inquest were to be held to determine the amount of judgment to be entered against WINTHROP LAWRENCE. Pursuant to a hearing and inquest held on November 24, 1970, judgment in the amount of $297,116.54 was entered on November 25, 1970 against WINTHROP LAWRENCE in favor of CROWN.

However, on November 10, 1970, prior to the inquest and hearing, and prior to entry of the final judgment, WINTHROP LAWRENCE filed a Petition under Chapter XI of the Federal Bankruptcy Act in the United States District Court for the District of Maryland, listing CROWN as one of its creditors (Appendix, Page 16a). On November 12, 1970,the Referee in Bankruptcy issued an order staying all actions against WINTHROP LAWRENCE from commencing or continuing without prior consent of the Bankruptcy Court (Appendix, Page 13a).

Thereafter, on November 13, 1970, in connection with CROWN'S motion for an inquest preference, counsel for CROWN advised the Chief Judge of the United States District Court for the Southern District of New York that they were aware of a newspaper article which indicated that WINTHROP LAWRENCE entered a Bankruptcy Petition in the Maryland District Court (Appendix, Page 34a).

Nevertheless, the inquest was held, as noted above, on November 24, 1970 and the judgment in question was thereafter entered on November 25, 1970.

PROCEEDINGS BELOW

DIVERSIFIED moved on May 15, 1975 pursuant to Federal Rules of Civil Procedure Rule 24 (a)(2) to intervene as of right in that action and to vacate the judgment of November 25, 1970 pursuant to Federal Rules of Civil Procedure Rule 60 (b)(4) on the grounds that the judgment was void because the Maryland Bankruptcy Court had stayed all legal proceedings against WINTHROP LAWRENCE. Thereafter, on July 30, 1975, following consideration of the motion, the United States District Court for the Southern District of New York, the Honorable Charles M. Metzner, denied DIVERSIFIED'S motion, holding that the matter should be referred to the Trustee in Bankruptcy and declining to pass upon the question of whether or not the judgment was void (Appendix, Page 41a).

POINT I

THE DISTRICT COURT ERRED IN IN FAILING TO PERMIT INTERVENTION

Rule 24 (a)(2), Federal Rules of Civil Procedure, states:

> (a). Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action . . . (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The purpose of DIVERSIFIED'S Motion to Intervene is to permit it to move to vacate the default judgment entered on November 25, 1970 against WINTHROP LAWRENCE on the ground that the default judgment was void, by reason of having been entered subsequent to a validly issued stay order of the Maryland Bankruptcy Court, and by reason of CROWN having known of the stay order at the time it moved for, and received, an inquest preference. That default judgment presently clouds title on property WINTHROP LAWRENCE transferred to DIVERSIFIED, by its Receiver, with the permission of the Referee in Bankruptcy in the Maryland District Court.

There are three requirements which must be met by an applicant seeking to intervene in an action under FRCP Rule 24 (a)(2):

(1). The assertion of interest in the subject of the action, (2) a possibility that the disposition of the action may as a practical matter impede protection of the interest, and (3) Inadequacy of representation of the interest by existing parties. American Jerex Co. v. Universal Aluminum Extrusions, Inc., 340 F. Supp. 524, 530 (E.D.N.Y. 1972).

Since DIVERSIFIED meets all three requirements, the District Court erred in failing to permit intervention.

POINT I (a)

INTERVENOR-APPELLANT POSSESSES THE REQUISITE INTEREST IN THE SUBJECT MATTER OF THE ACTION BY VIRTUE OF THE CLOUD ON TITLE TO ITS PROPERTY REPRESENTED BY THE JUDGMENT ENTERED AGAINST WINTHROP LAWRENCE

In American Jerex Co. v. Universal Aluminum Extrusions, Inc., 340 F. Supp. 524 (E.D.N.Y. 1972), property of the Defendant was attached by the Plaintiff in an action to recover a money judgment. The intervenor, a non-party assignee of the accounts receivable of the Defendant, moved to intervene and to vacate the attachment on the grounds that it was entitled to receive the proceeds of the attached accounts receivable and its interests would be impaired if it were not permitted to intervene to make the motion. In granting the motions, the Court decided that FRCP Rule 24 (a) authorized intervention for the purpose of litigating an issue that appeared to be collateral to the main issue, i.e. vacating the attachments, and held that the intervention met all three of the requirements. The decision emphasized that the interest of the intervenor could only be protected as a practical matter by permitting it to intervene.

> . . .[T]here is no requirement that an interest has to be of a legal nature identical to that of the claims asserted in the main action, Diaz v. Southern Drilling Corp., 427 F.2d 1118, at 1124 (5 Cir. 1970). American Jerex Co. v. Universal Aluminum Extrusions, Inc., 340 F. Supp., at 531.

Similarly, in Troger v. Hiebert Contracting Co., 339 F. 2d 530 (1st Cir. 1964), the Court permitted intervention by

a third-party because an attachment granted to the Plaintiff was held to constitute a cloud on the title the intervenor was claiming to the attached property.

The United States Supreme Court permitted intervention as of right under FRCP Rule 24 (a)(2) in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), on behalf of several users of natural gas who sought to intervene in an anti-trust action after the Supreme Court had directed the District Court to order divestiture of one natural gas distributor by another such company on the ground that the intervenors were adversely affected. In ordering intervention as of right for the users of the natural gas, the Supreme Court stated:

> Under old Rule 24 (a)(3) those "adversely affected" by a disposition of property would usually be those who have an interest in the property. But we cannot read it to mean exclusively that group. [Footnote omitted]
> Rule 24 (a)(3) was not merely a restatement of existing federal practice at law and in equity. If it had been, there would be force in the argument that the rigidity of the older cases remains unaltered, restricting intervention as of right very narrowly, as for example where there is a fund in Court to which a third-party asserts a right that would be lost absent intervention.
> 386 U. S., at 133-34.

Cascade was decided under the present Rule 24 and the Supreme Court, in stating that old Rule 24 (a)(3) was unduly restrictive, quoted from the 1966 Advisory Committee Report issued upon the revision of Rule 24 (a):

> If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of. Intervention of right is here seen to be a kind of counterpart to rule 19 (a)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest, which as a practical matter may be substantially impaired by the disposition of the action, he ought to have the right to intervene in the action on his own motion. See Louisell & Hazard, Pleading and Procedure: State and Federal, 749-50 (1962). Moore, Federal Practice (1966 Spec. Supp.), c. 24, pp.1-2. 386 U.S., at 134, fn 3.

The operative statement of the Supreme Court in this decision is "as a practical matter." For all practical purposes, DIVERSIFIED stands in the shoes of the Trustee in Bankruptcy who has transferred all right, title and interest to the property and is now faced with a void judgment which constitutes a cloud upon the title to that property. The Trustee in Bankruptcy has no further interest in the property, no interest in lifting the cloud on title and no further legal interest in the property. DIVERSIFIED is hindered and impaired in its use and enjoyment of the property by the judgment, and has the right to intervene in order to protect its interests.

POINT I (b)

ABSENT INTERVENTION, INTERVENOR-APPELLANT IS FORECLOSED FROM REMOVING THE CLOUD ON TITLE REPRESENTED BY THE JUDGMENT ENTERED AGAINST WINTHROP LAWRENCE

The second requirement which must be met in order to intervene as of right under FRCP Rule 24 (a)(2) is that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest. There is no doubt that the refusal of the Court to permit DIVERSIFIED to intervene has impaired and impeded DIVERSIFIED'S right to protect its interest in the property. The only Court which may vacate the default judgment is the Court which issued the judgment and, by failing to permit DIVERSIFIED to intervene in the action, the District Court has essentially eliminated all possibility of DIVERSIFIED removing the cloud on the title to its property.

In Levin v. Ruby Trading Corporation, 333 F.2d 592 (2d Cir. 1964), the Trustees of a bankrupt oil company sued the defendant for fraud. Intervention was sought by a lessee and contract-vendee of real property which was not the subject matter of the suit, but which had been in the hands of a Court-appointed receiver. The lessee and contract-vendee were not parties to the action and the District Court denied intervention as of right. In reversing that decision and ordering intervention, this Court considered their jurisdiction and stated that when an applicant is denied intervention as of right, such an order is appealable:

> . . .[I]t is settled law that if an applicant is entitled to intervene as of right, an order denying intervention is appealable. Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 524-525, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). See also Sutphen Estates, Inc. v. United States, 342 U.S. 19, 72 S.Ct. 14, 96 L.Ed. 19 (1951); Sam Fox Publishing Co. v. United States, 366 U.S. 683, 81 S. Ct. 1309, 6 L.Ed. 2d 604 (1961) .... Since we decide that the Appellants were entitled to intervene as of right, Brotherhood of Railroad Trainmen sustains our jurisdiction to decide this. 333 F.2d, at 594.

Similarly, it was stated by this court in Ionian Shipping Company v. British Law Insurance Co., 426 F.2d 186 (2d Cir. 1970), at p.189:

> . . .[T]he proper and sensible course is to assume that an order denying intervention is final for the purposes of Appeal and to proceed directly to the merits . . . .

In Levin, supra, this Court indicated the criteria to be considered when deciding whether or not an applicant will be adversely affected under the criteria established by the old Rule 24 and carried forward to the new Rule 24 stating:

> . . .[B]ut Rule 24 (a)(3) requires only that the applicant be "adversely affected" by the disposition, not that he be altogether without other means of asserting his rights:. . . 333 F.2d, at 595.

If, as this Court held, a contract-vendee could be adversely affected, then it is without doubt true that a purchaser would be adversely affected and therefore entitled to intervene as of right.

POINT I (c)

THE EXISTING PARTIES DO NOT ADEQUATELY REPRESENT THE INTEREST OF INTERVENOR-APPELLANT.

The third requirement under Rule 24 (a)(2) for intervention as of right is that the existing parties do not adequately represent the interest of the applicant. The major tests therein are the identities of the parties, the divergence of interest and whether or not the parties are actively prosecuting or defending those interests. Insofar as WINTHROP LAWRENCE is concerned, since the property has been sold by its Trustee to DIVERSIFIED, it no longer has an interest in whether or not there is a cloud on that title. It is obvious that CROWN'S interest is adverse to that of the Intervenor with regard to the judgment in question. The third-party in the original action, LAMMOT DUPONT COPELAND, JR. was the guarantor of the loan to WINTHROP LAWRENCE. Pursuant to an order issued by the Delaware Bankruptcy Court, all actions and proceedings as against COPELAND have been stayed. The property in question was sold by the Trustee for WINTHROP LAWRENCE and furthermore, the default judgment was entered against WINTHROP LAWRENCE only, therefore, COPELAND is not interested in the matter and does not adequately represent DIVERSIFIED'S interests. See also, McDonald v. E. J. Lavino Co., 430 F.2d 1065 (5th Cir. 1970); Fox v. Glickman, 355 F.2d 161 (2d Cir. 1965); Cuthill v. Ortman-Miller Machine Co., 216 F.2d 336 (7th Cir. 1954); Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir. 1953).

Furthermore, the application for relief by DIVERSIFIED was timely made, despite the lapse of time since entry of the judgment. The property was acquired by DIVERSIFIED by quit-claim deed from the Trustee in Bankruptcy on June 24, 1974 (Appendix, Page 28a) and it was subsequently discovered that the title was clouded by the judgment of November 25, 1970 docketed in Madera County, California. The only way to protect the interests of DIVERSIFIED is to permit intervention in the action which resulted in the default judgment in order to have that judgment vacated on the grounds it was void. The Courts have permitted such intervention, McDonald v. E. J. Lanino Company, 430 F.2d 1065 (5th Cir. 1970), even after judgment has been entered.

In McDonald, the Court permitted intervention by an insurance carrier after judgment had been entered to protect its subrogation rights and stated that the intervention did not prejudice the rights of the parties (because the funds had not yet been distributed) nor interfere with the orderly process of the Courts. Mere inconvenience to the parties was not sufficient reason to deny intervention. See, Securities and Exchange Commission v. U. S. Realty and Improvement Co., 310 U.S. 434 (1940); Smith Petroleum Service, Inc. v. Monsanto Chemical Co., 420 F.2d 1103 (5th Cir. 1970); Liston v. Butler, 421 F.2d 542 (D.C. Ariz., 1967).

Therefore, it was error for the Court below to deny the motion to intervene. DIVERSIFIED is entitled as of right to intervene in this action in order to protect its interests

in property purchased from the Trustee in Bankruptcy of the Judgment debtor, WINTHROP LAWRENCE, which property is presently adversely affected by the judgment docketed in the Madera County, California Court. DIVERSIFIED can clear the cloud on title only by being permitted to intervene in this action and by this Court vacating the judgment since the judgment was void and was entered in violation of a stay order issued by the Maryland Bankruptcy Court.

POINT II

THE DISTRICT COURT ERRED IN REFUSING TO PASS UPON THE QUESTION OF WHETHER OR NOT THE JUDGMENT WAS VOID AND SHOULD HAVE VACATED THE JUDGMENT.

Federal Rules of Civil Procedure Rule 60 (b)(4) provides:

> (b). On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (4) The judgment is void;

The lower Court granted CROWN's Motion for summary judgment by an order dated October 28, 1970 (Appendix, Page 27a). Said order further stated that judgment was to be entered after a hearing and inquest were held to determine the amount of the judgment. That order of October 28, 1970 was not a final judgment in the action. In fact, it was not docketed in California against WINTHROP LAWRENCE'S property. It was the judgment entered on November 25, 1970 for $297,116.54 which was filed in California against WINTHROP LAWRENCE'S property (Appendix, Page 27a). But that judgment was void because the hearing and inquest should not have been held after the Referee in Maryland issued his stay order (Appendix, Page 13a). CROWN was listed as a creditor in the petition filed by WINTHROP LAWRENCE (Appendix, Page 16a) and in fact, CROWN was on actual notice of the Bankruptcy petition as indicated by the letter from CROWN'S counsel to the Chief Judge of the Southern District of New York, dated November 13, 1970, prior to the inquest (Appendix, Page 34a).

Therefore, CROWN is estopped from denying that they were unaware of the stay order by their own admission.

It was error for the District Court to decline consideration of DIVERSIFIED'S motion to vacate the judgment since the United States District Court for the Southern District of New York, which entered the void judgment, is the only Court which may vacate that judgment. Relief under Rule 60 (b) can ordinarily be obtained only by motion in the Court that rendered the judgment; Banker's Mortgage Company v. United States, 423 F.2d 73, 78 (5th Cir.1970), Certiorari denied 399 U.S. 927. See, generally, Wright and Miller, Federal Practice and Procedure, Volume 11, § 2865.

The Court below had no discretion to deny the motion to vacate the judgment on the grounds that it was void; Houston v. Smith, 312 F.2d 337 (D.C.Cir., 1962); Hicklin v. Edwards, 226 F.2d 410 (8th Cir., 1955). It is indisputable that the judgment was void based upon the facts as set forth by the dates. The judgment was entered after the stay order was issued by the Maryland Bankruptcy Court and CROWN is estopped from denying knowledge of the stay order and the Bankruptcy proceedings by virtue of their letter regarding their motion for inquest preference indicating that they knew of the pending Maryland Bankruptcy proceedings. Certainly a litigant on notice of a pending Bankruptcy Petition filed by a target Defendant must be held to be aware that the filing of a Bankruptcy Petition effectively stays all further proceedings against the Bankrupt party.

The judgment docketed against the property in California was the final judgment of November 25, 1970 (Appendix, Page 27a). The order of October 28, 1970 (Appendix, Page 27a) was not a final judgment.

POINT II (a)

THE ORDER OF OCTOBER 28, 1970 WAS NOT A FINAL JUDGMENT.

Under Rule 58 of the Federal Rules of Civil Procedure, a separate document must be in existence to constitute a final judgment which can be entered. In United States v. F. M. Schaefer Brewing Co., 356 U.S. 227 (1958) the Supreme Court, in deciding whether or not the time in which to file an appeal had run, held that the granting of a motion for summary judgment without findings of dates of payment or amount of interest and without a later formal document signed by the Judge and designated as a "Judgment" with specified amounts is clearly not a final act, is not a judgment under the Federal Rules of Civil Procedure and cannot constitute entry of a judgment against a party under Rule 58. See generally, annot. 10 ALR Fed. 709, 712.

The Supreme Court re-affirmed this decision, in United States v. Indrelunas, 411 U.S. 216 (1973) where it stated, at p. 221:

> Here there was nothing meeting the requirements of the "separate document" provision of Rule 58 until February 25, 1971. The docket entry following the jury's verdict [on March 21, 1969] simply reflected the jury's determination as to the liability of the parties, without specifying an amount due. . . and was not recorded on a separate document . . .

The Court further stated that Rule 58 was a mechanical rule that must be mechanically applied to avoid uncertainties.

Since the order of October 28, 1970 was not a final judgment and not capable of entry as such, and CROWN in fact docketed the later judgment of November 25, 1970, we must examine the validity of the November 25, 1970 Judgment.

POINT II(b)

THE JUDGEMENT OF NOVEMBER 25, 1970 IS A VOID JUDGMENT

Since the Maryland Bankruptcy Court effectively stayed all proceedings against WINTHROP LAWRENCE on November 12, 1970 and since CROWN had notice of that stay as a creditor listed on WINTHROP LAWRENCE'S petition and by its own admission in the letter requesting an inquest preference, the present action should never have gone beyond the October 28, 1970 order, the hearing of November 2', 1970 should not have been held and the judgment of November 25, 1970 should never have been entered against WINTHROP LAWRENCE.

Once the stay was entered in Maryland, the hearing and inquest after the October 28, 1970 should never have been held. As it was stated In Re Schachter, 143 F. Supp. 565 (S.D.N.Y. 1956):

> It is clear beyond cavil that the filing of a petition in bankruptcy, whether voluntary or involuntary, is a caveat to all the world that the property of the bankrupt, wherever situated, was at once in custodia legis, so that subsequent proceedings cannot be had in other Courts to reach such property. (Citations) (Emphasis Supplied).

Similarly, in In Re Oceanside Estates, Inc., 84 F. Supp. 114 (E.D.N.Y. 1948) a Chapter XI petition was filed at 9:18 a.m. and a state Court judgment entered at 3:26 p.m. on the same day. It

held ". . . The lien against the property of the debtor in possession, therefore, was entered after the petition for arrangement was filed and must be nullified . . . . "84 F. Supp. at 144.

Or as stated in In Re Williams, 53 F.2d 486, 488:

> . . . Subsequent to filing the petition in bankruptcy, liens cannot be given or acquired on the property affected thereby...This is true whether the attempt be made through legal proceedings or by act of the bankrupt. (Citations.)...

It is clear that the foregoing furnish ample authority for the invalidation of the alleged lien, whether such decisions involve straight bankruptcy or, as herein, a Chapter XI arrangement proceeding (see 11 U.S.C. § 702). It is equally clear that it matters not where the bankrupt or debtor's real property happens to be physically located (In Re Riccobono, 140 F. Supp. 654 (S.D. Cal. 1956). The rule remains the same, as well stated in Polish v. Johnson Service Company, 173 F. Supp. 776, 778:

> Once a petition in bankruptcy has been filed, all of the bankrupt's property passes into the custody of the bankruptcy court and is subject to its jurisdiction. This property of the bankrupt is said to be in custodia legis and neither the bankrupt nor its creditors can take any action with respect to it...

Or in the language of a California federal court (In re California Pea Products, 37 F. Supp. 658, 661):

> . . . The possession of the property by the trustee is the court's possession, and any act interfering

> with the court's power of control and disposal and done without the court's sanction is void. (Citation.) (Emphasis Supplied).

Since the proceedings subsequent to October 28, 1970 were void, and since the judgment entered as a result of those proceedings was the only judgment which could have been entered against WINTHROP LAWRENCE, the judgment of November 25, 1970 should be vacated in the interests of justice. In United States v. Melichor, 56 E.R.D. 49 (E.D. Wis. 1972), the defendants moved to set aside a default judgment entered against them two years earlier. The court granted the motion and set aside the judgment on the grounds that the judgment entered by the plaintiff did not show a sum certain. The court further held that the judgment should not have been entered in that form, i.e. without a sum certain shown on its face, stating that although entry of the default was proper, the judgment entered thereon was not.

The Bankruptcy Court's order staying all proceedings against WINTHROP LAWRENCE must take precedence over the action of the Court below in entering the judgment subsequent to the stay order. As stated by the Supreme Court in Kalb v. Feuerstein, 308 U.S. 433 (1940) in an action brought to vacate a judgment of foreclosure obtained against farmers who had petitioned for a composition under the Federal Bankruptcy Act Section 75 (Frazier

Lemke Act, 11 U.S.C. §203):

> Thus Congress repeatedly stated its unequivocal purpose to prohibit - in the absence of consent by the bankruptcy court in which a distressed farmer has a pending petition - a Mortgagee or any court fr[illegible] instituting, or maintaining if already instituted, any proceedings against the farmer to sell under mortgage foreclosure, to confirm such a sale, or to dispossess under it. 308 U.S. at 441
> . . . it becomes clear . . . that no proceedings after the filing of the petition could be instituted, or if instituted prior to the filing of the petition, should not be maintained in any court, or otherwise. 308 U.S. at 442

As demonstrated by the Supreme Court's words, the Bankruptcy Act protects the debtor from further proceedings in actions already commenced once the petition has been filed and the Bankruptcy Court accepts custody of the bankrupt's property. It is therefore clear that the entry of judgment against WINTHROP LAWRENCE on November 25, 1970 was void and should be vacated.

Since there was a clear error in entering the original judgment against WINTHROP LAWRENCE and that judgment is in fact void, the Court below had no discretion to deny the motion to vacate the judgment and should have vacated the Judgment sua sponte, as has been done in cases where the judgment was based upon fraud, Kupferman v. Consolidated Research and Manufacturing Corp., 459 F.2d 1072 (2d Cir. 1972); Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514, 521-22 (3rd Cir. 1948); 7 Moore, Federal Practice, ¶60.33 at p.507 et seq. (1971 Ed.). This Court should reverse the denial of the motion to vacate and order that the void judgment be vacated since there is no question that the

default judgment was void.

POINT III

THE DISTRICT COURT ERRED IN URGING THAT THE MATTER BE REFERRED TO THE TRUSTEE IN BANKRUPTCY

In its decision below, the District Court stated that the matter should be referred to the Trustee in Bankruptcy (Appendix, Page 41a). This was error by the Court since the Trustee in Bankruptcy no longer has any right, title or interest in the property in question. All right, title and interest to the property in question was transferred to DIVERSIFIED by quit-claim deed dated June 24, 1974 (Appendix, Page 28a) and DIVERSIFIED now holds all right, title and interest formerly held by the Trustee in Bankruptcy and therefore is the only party with an interest in the matter of removing the cloud on the title to the property. The Courts have narrowly defined the parties who have standing to base an application to vacate a judgment as one who by operation of law is tantamount to a party in relation to the matter involved, for instance, an heir or an assignee, In Re Casco Chemical Co., 335 F.2d 645 (8th Cir. 1964); Mobay Chemical Co. v. Hudson Foam Plastics Corp., 277 F. Supp. 413 (S.D.N.Y., 1967); Anno. 12 ALR Fed. 925.

As was stated by the Court in In Re Penn Central Commercial Paper Litigatior, 62 F.R.D 341 (S.D.N.Y., 1974),

> . . .[A]n interest, to satisfy the requirements of Rule 24 (a)(2), must be significant, must be direct rather than contingent, and must be based on a right which belongs to the proposed Intervenor rather than to an existing party to the suit.

The interest DIVERSIFIED possesses herein is to remove a cloud upon title to property owned by DIVERSIFIED and no longer owned by the Trustee in Bankruptcy for WINTRHOP LAWRENCE who has no reason to be interested in the matter at this time.

It was clearly error for the Court below to refuse DIVERSIFIED'S motion to intervene and to vacate the judgment and take the position that the Trustee in Bankruptcy is the proper party to handle the matter. From a realistic and practical standpoint, the Trustee in Bankruptcy has absolutely no interest in this matter and it would be unjust and unfair to foreclose DIVERSIFIED from protecting the right, title and interest in its property which has been adversely affected by a void judgment entered in the United States District Court for the Southern District of New York.

POINT IV

THIS COURT HAS THE POWER TO REVERSE THE DISTRICT COURT ON THE LAW AND THE FACTS AND ORDER THE JUDGMENT VACATED OR REMAND THE MATTER TO THE DISTRICT COURT WITH ORDERS TO VACATE THE JUDGMENT.

The District Court erred in refusing to permit intervention, refusing to decide whether or not the default judgment of November 25, 1970 was void and in taking the position that the matter should be referred to the Trustee in Bankruptcy. This Court has the power to reverse the erroneous decision and order that the judgment be vacated without further proceedings below.

In Greenspahn v. Joseph H. Seagram & Sons, 186 F.2d 616 (2d Cir. 1951), this court has held that an appeal of an order denying the vacating of a judgment under F.R.C.P. Rule 60 (b)(4), on the grounds that the judgment is void, brings up the question of the validity of the underlying judgment on the appeal.

The facts before the District Court were undisputed. The moving papers showed that the final judgment of November 25, 1970 was entered subsequent to the issuance of a stay order prohibiting further actions or proceedings against WINTHROP LAWRENCE . CROWN was listed on the list of creditors and has admitted that it was aware of the filing of the Bankruptcy petition.

Upon the appeal of a matter involving mixed questions of facts and law, conclusions of law and findings as to ultimate facts are within the competence of the reviewing appellate court, University Hills, Inc. v. Patton, 427 F.2d 1094

(6th Cir. 1970). The District Court's refusal to decide the question does not conclude this court from deciding the question of law involved, namely the validity of the default judgment of November 25, 1970, Campana Corp. v. Harrison, 114 F.2d 400 (7th Cir. 1940) and this court should reverse the decision and order the judgment vacated without further proceedings below.

In cases in which the lower court has failed to make findings or decide an issue, and the appellate court modifies or reverses because of a misapplication of the law, the mandate of the Court of Appeals can be such as to foreclose further proceedings in the District Court and the District Court must merely enter judgment as decreed by the higher court, Thornton v. Carter, 109 F.2d 316 (8th Cir. 1940); Pike Rapids Power Co. v. Minneapolis, St.P. &S.S.H. Ry. Co., 106 F.2d 891 (8th Cir. 1939). This is an appropriate case for such an order.

Therefore, since the default judgment of November 25, 1970 was clearly void, and the District Court erred in refusing to consider that issue, this court should reverse and order that the default judgment be vacated on the law and on the uncontroverted facts. Judgments which are void or are vehicles of injustice should not be left standing, Brennan v. Midwestern Life Ins. Co., 450 F.2d 999 (7th Cir. 1971)

CONCLUSION

For all of the above reasons, it is respectfully submitted that the Court below was in error in denying DIVERSIFIED'S motion to intervene, was in error in refusing to vacate the judgment against WINTHROP LAWRENCE and was in error in taking the position that the matter should be properly prosecuted by the Receiver of WINTHROP LAWRENCE.

WHEREFORE, it is respectfully prayed that the order of Judge Metzner dated and entered on July 30, 1975 be reversed and DIVERSIFIED be permitted to Intervene in the action and the Court below be directed to vacate the judgment against WINTHROP LAWRENCE CORPORATION of November 25, 1970 on the grounds that said judgment is void and that Intervenor-Appellant, DIVERSIFIED have such other and further relief as may be just in the premises.

Respectfully submitted,

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Of Counsel:

ROY E. POMERANTZ

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARY E. BOLGER , being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides Bronx , New York.

That on the 27 day of October , 1975 , deponent served the within Joint Appendix and Main Brief of Intervenor-Appellant, Diversified General, Inc. upon:

PAUL S. AUFRICHTIG
Attorney for Defendant
WINTHROP LAWRENCE CORPORATION
866 United Nations Plaza
New York, NY 10017

WEILL, GOTSHAL & MANGES
Attorneys for Defendant
LAMMOT DUPONT COPELAND, JR.
767 Fifth Ave.
New York, NY 10022

in this action, at the address(es) designated by said attorney(s) for that purpose by depositing same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Mary E. Bolger

MARY E. BOLGER

Sworn to before me ~~this~~
this 28th day of October , 1975.

Ron O'Sheed

BRIAN A. SHERIDAN
Notary Public, State of New York
No. 31-4218035
Qualified in New York County
Commission Expires March 30, 1977